IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1473

NADEAN O. McARTHUR,
Petitioner.

versus

THE HONORABLE PHILIP G. NOURSE,
Circuit Judge of the
Nineteenth Judicial Circuit of Florida,
in and for Okeechobee County,
Respondent.

PETITIONER'S REPLY BRIEF

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In his brief, respondent places considerable emphasis upon Rule 6.16(b), Florida Rules of Appellate Procedure (1962 Revision), which at the time of petitioner's appeal of her conviction, provided:

> "Upon an appeal by the defendant from the judgment the appellate court shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal. Upon an appeal from the judgment by

> a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not."

Respondent contends that this Florida rule of court gives Florida appellate courts "broad discretion . . . to fashion remedies appropriate to the circumstances of each case in the 'interests of justice' " (Respondent's Brief at 13-14), and that somehow this "broad discretion" provides justification for retrial of petitioner, the double jeopardy clause notwithstanding. Respondent further suggests that Rule 6.16(b) gives the appellate courts of Florida the right to order a new trial when, though the evidence may be legally and technically sufficient to support the jury's verdict, the court concludes that the *weight* of the evidence does not support the conviction, citing *Tibbs* v. *State*, 337 So.2d 788 (Fla. 1976) (Respondent's Brief at 14-15).

The fact that the Florida Supreme Court may have attempted to give itself and the lower Florida appellate courts the power "to fashion remedies appropriate to the circumstances of each case in the 'interests of justice' " is obviously irrelevant and ineffectual to the extent that it conflicts with the double jeopardy clause's prohibition of placing an individual twice in jeopardy for the same offense. Moreover, respondent's attempt to suggest that the Supreme Court of Florida might have reversed petitioner's conviction, not because the evidence was legally insufficient to establish her guilt, but rather because that court concluded that the weight of the evidence

presented by the State left a question concerning petitioner's guilt, is untenable in light of the language used by the Supreme Court of Florida in its opinion reversing petitioner's conviction.* On the contrary, it is apparent that the Florida Supreme Court based its reversal of petitioner's conviction on the conclusion that the evidence presented was legally insufficient to justify that conviction. In addition, since petitioner was not sentenced to death, it is not readily apparent how the second sentence of Rule 6.16(b) would have had any application to petitioner's appeal of her conviction.

Respondent next argues that the Florida Supreme Court reversed petitioner's conviction and ordered a new trial based on grounds asserted by petitioner in a motion for new trial filed in the trial court (Respondent's Brief at 18-19). The conclusion which respondent wishes the Court to draw from this contention is that petitioner, by challenging the sufficiency of the evidence in a motion for new trial, waived her right to rely upon the double jeopardy clause. This contention, however, is unsupported by the facts.

In the first place, petitioner did not ask the Florida Supreme Court to grant her a new trial because the evidence presented had been legally insufficient to justify her conviction. Rather, her briefs uniformly re-

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* The Florida Supreme Court's opinion included the following statements: "the prosecution's proof of Mr. McArthur's intentional murder was not inconsistent with his accidental death" (351 So.2d at 978; A. 14); "appellant's innocence has not been disproved" (351 So.2d at 978; A. 15); and "[t]he state simply did not carry its burden of proof" (351 So.2d at 978; A. 15). (A. ___ refers to the appendix to the petition for writ of certiorari filed herein.)

quested reversal with directions that she be discharged because of the trial court's erroneous refusal to grant her repeated motion for judgment of acquittal. Furthermore, the Court's attention should be directed to the fact that, prior to the decision of the Supreme Court of Florida in *Mancini* v. *State*, 273 So.2d 371 (Fla. 1973), a defendant was required to challenge the legal sufficiency of the evidence by filing a motion for new trial in the trial court before an appeal could be taken challenging the legal sufficiency of the evidence. *See, e.g., State* v. *Owens*, 233 So.2d 389 (Fla. 1970). The *Mancini* decision has created considerable confusion concerning what must be done to preserve one's right to challenge the sufficiency of the evidence on appeal, since, while *Mancini* held that it was no longer necessary to file a motion for new trial in order to challenge on appeal *the legal sufficiency of the evidence* presented by the State, assuming that a motion for judgment of acquittal was properly made, *Mancini* also held that it *was* necessary to file a motion for new trial before one could argue on appeal that the *weight of the evidence* in a jury trial did not support the jury's verdict. *See Everett* v. *State*, 339 So.2d 704 (Fla.3d DCA 1976); *Castillo* v. *State*, 308 So.2d 619 (Fla.3d DCA 1975). *See generally* 1 C. Wright, Federal Practice and Procedure (Criminal) § 553 (1969 ed.). It was because of the confusion engendered by the *Mancini* case, and because counsel for petitioner sought to protect her right to challenge the *weight* of the evidence on appeal, that those portions of the motion for new trial relating to the sufficiency of the evidence cited by respondent were so included. Dealing with a similar contention that a motion for new trial including a challenge to the sufficiency of the evidence constituted a waiver of the defendant's right to rely on the double jeopardy clause, the United States Court of Appeals for the District of Columbia Circuit, in *United States* v. *Wiley*, 517 F.2d 1212 (D.C.Cir. 1975), said:

> "[A] waiver should not result even where the defendant's sole ground for appeal is the insufficiency of the evidence and a new trial motion is deliberately made. By adding the new trial motion the defendant is plainly not asking for a retrial where the court considers the lack of evidence to require the grant of his motion for judgment of acquittal. Rather, he is seeking to obtain a new trial when the court considers the evidence to be marginally sufficient but determines that the state of the evidence calls for a new trial in the interest of justice." *Id.* at 1217 n.24.

Thus, whatever may be said about petitioner's having filed a motion for new trial, that act certainly did not constitute the type of "voluntary knowing relinquishment of a right" which this Court has repeatedly found to be necessary before it would conclude that a constitutional right had been waived. *See, e.g., Green* v. *United States*, 355 U.S. 184, 191 (1957). By including grounds directed to the weight of the evidence in the motion for new trial, counsel for petitioner were merely attempting to preserve petitioner's right to raise that claim in the appellate court. In this regard, the observations made by the court in *People* v. *Brown*, 99 Ill.App.2d 281, 241 N.E.2d 653 (Ct.App.1968), are particularly appropriate. There, the court said:

"We can think of no reason in fairness and justice why a defendant on appeal should be required to discard his right to seek a new trial based on trial errors, in order to validate his right to seek an outright reversal for lack of evidence. In any sensible consideration of his position the former is seen to be a second-choice alternative to the latter. If his double jeopardy rights are deemed to have been waived by his request for a new trial, the waiver should then take effect only if the reversal is granted for the reasons contained in the new-trial request, and, if the conviction is reversed for lack of evidence, the waiver contained in an accompanying request for a new trial would never become operative." 241 N.E.2d at 662.

Finally, respondent argues that "[t]he spectre of endless retrials envisioned by Petitioner . . . if her arguments are not accepted by this Court, is an illusion," in that "defendants such as Petitioner are protected against the possibility of such vexatious litigation" because "[t]he appellate courts of Florida retain the authority to discharge a defendant completely if the evidence is insufficient and the interests of justice would be served by a discharge." (Respondent's Brief at 19-20.) Assuming, for purposes of argument, that the appellate courts of Florida do retain such authority, why was it not exercised in this case? Respondent fails to identify how the "interests of justice" are served by allowing the State to try petitioner again, instead of directing her discharge. Likewise, in the Florida Supreme Court's opinion

reversing petitioner's conviction because the evidence was legally insufficient to justify the conviction, no mention is made of any factors supporting a conclusion that the "interests of justice" require ordering a new trial, rather than directing that petitioner be discharged.

Petitioner repeatedly moved for a judgment of acquittal in the trial court, contending that the evidence was legally insufficient to support a conviction of the offense with which she was charged, or any other offense. Each time, her motion was denied. Had the trial judge granted her motion, the double jeopardy clause would have prohibited a subsequent trial for the same offense. *See United States* v. *Martin Linen Supply Company*, 430 U.S. 564 (1977); *Fong Foo* v. *United States*, 369 U.S. 141 (1962). The Florida Supreme Court reversed petitioner's conviction because the evidence was legally insufficient to support the conviction, the ground unsuccessfully urged upon the trial judge three successive times in support of petitioner's motion for judgment of acquittal. "Justice" requires that petitioner be protected against being tried a second time on the same charge. Only this Court can assure such a result.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for writ of certiorari, this Court should issue a writ of certiorari to review the order of the Supreme Court of Florida denying petitioner's suggestion for writ of prohibition.

Respectfully submitted,

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